Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Low-Volume Long Distance Users	)	CC Docket No. 99-249
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	

COMMENTS OF THE COMPETITIVE UNIVERSAL SERVICE COALITION ON THE REMAND OF THE $650 MILLION AMOUNT OF INTERSTATE ACCESS SUPPORT

The Competitive Universal Service Coalition ("CUSC"), 1/ by counsel, submits these comments on the Common Carrier Bureau's Public Notice regarding the remand of the $650 Million amount of CALLS support. 2/ As discussed below, CUSC submits that the Commission must adhere to its fundamental decision to eliminate implicit subsidies in access charges and ensure that all universal service support is explicit and portable. However, rather than trying to find a more reasoned basis for the arbitrary $650 million "interstate access-related support"

1/ The Competitive Universal Service Coalition includes a number of diverse wireless and wireline competitive carriers (and their trade associations) that provide universal service or are considering doing so.

2/ *Common Carrier Bureau Seeks Comment on Remand of $650 Million Support Amount Under Interstate Access Support Mechanism for Price Cap Carriers*, CC Docket Nos. 96-262, 94-1, 99-248 & 96-45, DA-2817 (rel. Dec. 4, 2001).

fund established by the *CALLS Order*, 3/ the Commission should consolidate its consideration of the narrow issues remanded by the Fifth Circuit in *TOPUC II* with its consideration of the broader issues regarding the structure of the high-cost support plan mandated by the Tenth Circuit remand in *Qwest Corp. v. FCC*. 4/

I. ALL SUPPORT MUST BE EXPLICIT AND PORTABLE.

CUSC submits that the Commission should continue to adhere to its decision in the *CALLS Order* to eliminate the implicit support formerly embedded in the interstate access charges of price cap incumbent local exchange carriers ("ILECs"), and ensure that any and all remaining universal service support is explicit, portable, and competitively neutral. This basic policy decision, which was not reversed or even addressed by the *TOPUC II* court, is a necessary step to open local telecommunications markets to competition. Prospective competitive entrants, such as CUSC's members, cannot compete on a level basis with ILECs if the ILECs receive implicit subsidies that are unavailable to their competitors. As the Commission has recognized, "A new entrant faces a substantial barrier to entry if its main competitor is receiving substantial support from the . . . government that is not available to the new entrant." 5/ Reviewing courts have, on a number of

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3/ *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962 (2000) ("*CALLS Order*"), *rev'd in part and remanded sub nom. Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001) ("*TOPUC II*").

4/ 258 F.3d 1191 (10th Cir. 2001).

5/ *Western Wireless Corp. (Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934)*, 15 FCC Rcd 16227, 16231, ¶ 8 (2000).

occasions, reached consistent conclusions and made it clear that the Act requires the elimination of implicit subsidies from access charges:

> "[T]he plain language of § 254(e) [of the Act] does not permit the FCC to maintain any implicit subsidies." * * * * [I]t is not disputed that the recovery of universal service costs through access charge to IXCs is an implicit subsidy. * * * Thus, . . . the FCC decision to permit ILECs to continue to recover universal service costs through access charges . . . . countermands Congress's clear legislative directive, as we articulated in *TOPUC [I]* and reaffirmed in *Alenco*, that universal service support must be explicit." 6/

The *TOPUC II* remand decision did not disturb the Commission's basic policy of eliminating implicit subsidies from access charges and replacing a portion of them with explicit and portable support. However, the court in *TOPUC II* remanded the FCC's adoption of the $650 million amount, based on the proposal submitted by the CALLS coalition members, because the FCC failed to exercise sufficient independent judgment in concluding that this amount was reasonable. 7/

II. THE $650 MILLION *CALLS ORDER* FUND IGNORES THE STATUTORY "AFFORDABILITY" REQUIREMENT AND THE RELATIONSHIP WITH STATE SUPPORT MECHANISMS.

CUSC submits that more fundamental problems plague the *CALLS Order's* selection of $650 million as the amount of "interstate access-related support" fund than the lack of analysis cited by the Fifth Circuit. The very structure of this fund, established to preserve revenue neutrality in the context

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6/ *Comsat Corp. v. FCC*, 250 F.3d 931 (5th Cir. 2001), quoting *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 425 (5th Cir. 1999) ("*TOPUC I*"), and citing *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 623 (5th Cir. 2000).

7/ *TOPUC II*, 265 F.3d at 327-28.

of access charge reform, fails to address fundamental matters that the Act requires the Commission to consider, as the Tenth Circuit confirmed in *Qwest Corp. v. FCC*.

Thus, rather than conducting a remand proceeding in response to the narrow *TOPUC II* remand to establish a more sustainable explanation of the arbitrary $650 million amount, the Commission should consolidate its consideration of this issue with the broader re-assessment of the overall high-cost universal service funding scheme in response to the *Qwest Corp. v. FCC* remand. That decision requires the Commission to undertake a fundamental re-assessment of its universal service policy, and to consider: (1) the meaning of the statutory directive that rates be "affordable" and "reasonably comparable" in different geographic areas; (2) the meaning of the statutory directive that funding be "sufficient" to accomplish these objectives; and (3) the relationship between federal and state funding mechanisms, including creating possible "inducements" for states to assist in implementing universal service goals. CUSC submits that the proper amount of the "interstate access-related support" fund created by the *CALLS Order* is inextricably linked to these larger questions.

Most fundamentally, the $650 million "interstate access-related support" fund created by the *CALLS Order* bears no relationship to the statutory directives of ensuring "affordable" and "comparable" rates, or of establishing "specific, predictable, and sufficient Federal and State mechanisms." 8/ Nor does the figure adhere to the Commission's established objectives of basing such funding

8/ 47 U.S.C. §§ 254(b)(1), (3), (5); *see Qwest Corp. v. FCC*.

on an analysis of total, unseparated, forward-looking cost, to ensure that the amount is not excessive. 9/ Rather, the amount appears to have been calculated based on the difference between the price cap ILECs' historical revenue levels and new revenue levels keyed to the somewhat arbitrarily selected subscriber line charge ("SLC") caps, with the apparently intentional result of preserving revenue-neutrality for the price cap ILECs. The CALLS coalition, whose proposal was adopted by the FCC, apparently derived the figure based on the difference between the pre-existing access revenue levels of the price cap ILECs and the projected access revenue levels after implementation of the new SLC caps and the other CALLS rate structure and pricing reforms. 10/ (The "back of the envelope" analysis submitted by AT&T, justifying the $650 million amount based on the difference between 25% of forward-looking costs and the new access revenue levels, was neither supported by the other members of the CALLS coalition, nor explicitly endorsed by the Commission. 11/ In any case, if AT&T's analysis had seriously

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9/ *See generally Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 (1997), Seventh Report and Order and Thirteenth Order on Reconsideration, 14 FCC Rcd 8078 (1999).

10/ The Coalition's technical formulas defining the fund indicate that the proposed amount of funding was derived based on pre-existing ILEC revenue levels. *See* Letter from John Nakahata, Counsel to CALLS, to Magalie Roman Salas, Secretary, FCC (Aug. 20, 1999), App. A at 10-11 (defining the minimum funding per line based on "price cap CMT revenue," which in turn was defined [*id.*, App. A at 3] as the per-line revenue an ILEC would have been permitted to receive for loop-related rate elements as of December 31, 1999).

11/ *CALLS Order*, ¶ 200 & notes 437-39.

formed the basis of the new fund, the fund amount would have been significantly smaller -- $613 million instead of $650 million. 12/)

CUSC submits that it would not serve the public interest for the Commission to "shore up" its selection of a $650 million fund size in the *CALLS Order* based on the AT&T forward-looking cost-based rationalization. Nor do the other explanations suggested in the record address the larger issues that *Qwest Corp. v. FCC* requires the Commission to address. CUSC calls upon the Commission to proceed with that broader re-examination, to ensure that the universal service system fully complies with the Act, and to remedy the "shortcomings in the current system [that] undermin[e] economic viability of competition and new entry." 13/

Respectfully submitted,

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12/ *Id.*, n.439.

13/ Chairman Michael K. Powell, Digital Broadband Migration – Part II at 5 (October 23, 2001) (at http://www.fcc.gov/Speeches/Powell/2001/spmkp109.pdf).